U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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Date: SEP 27 2011 Office: NEBRASKA SERVICE CENTER File [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition[1], which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology development and consulting firm. It seeks to employ the beneficiary permanently in the United States as an analyst/programmer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. bachelor's degree.

On appeal, counsel asserts that the petitioner intended to accept any Bachelor's degree for the proffered position by requiring "Bachelor's" degree in H4 of the ETA Form 9089 instead of specifying "U.S." degree, and therefore, the director inappropriately found that a U.S. degree is the minimum educational standard required.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] The petitioner filed an I-140 immigrant petition [redacted] under the third preference employment-based category based on the underlying labor certification, on behalf of the instant beneficiary on December 16, 2005. The petition was initially approved but the approval was revoked on June 14, 2010. Before the director served a notice of intent to revoke the approval of the petition, on March 26, 2010, the petitioner filed the instant petition under the second preference employment–based category for the beneficiary in the same position based on the same labor certification.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also*, *Madany*, 696 F.2d at 1015.

The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, counsel did not submit any new or additional evidence on appeal.

USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in computer science, mathematics or engineering is the minimum level of education required. Line 6 reflects that the proffered position requires 60 months (five years) of experience in the job offered. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is not acceptable.

The record contains official college or university records showing that the beneficiary obtained a bachelors of science degree from Andhra University in India in 1976 and a masters of science degree from Osmania University in India in 1980. While the three-year bachelor of science degree from India cannot be equated to a U.S. bachelor's degree, his master of science degree earned after completion of the three-year bachelor's degree program is the equivalent to a U.S. bachelor of science degree. The beneficiary holds a "foreign equivalent degree," but not a U.S. bachelor's degree, and therefore, the beneficiary does not meet the job requirements of the proffered job as set forth on the labor certification since the labor certification clearly indicates that a foreign educational equivalent is not acceptable in the instant matter.

On appeal counsel asserts that the director erred in interpreting the requirement of a bachelor's degree in Part H, line 4 as a U.S. bachelor's degree and also asserts that it is the petitioner's intent to include both a U.S. bachelor's degree and a foreign equivalent degree by requiring a bachelor's degree in line 4. The AAO notes that unlike the Form ETA 750, the ETA Form 9089 requires the employer to not only provide the minimum educational requirements but also indicate whether a foreign educational equivalent to a U.S. degree is acceptable. Therefore, the plain meaning of the language in the ETA Form 9089 indicates that "a bachelor's degree" in Part H, line 4 should be reasonably interpreted as meaning a U.S. bachelor's degree, specifically when the petitioner answers no to question H9. The director's determination that the proffered position requires a U.S. bachelor's degree is not based on his interpretation of the language of "bachelor's" degree in line 4, but correctly based on reading the plain language on ETA Form 9089 as a whole including the language in line 9 of Part H. Counsel's assertion is misplaced. Reading the ETA Form 9089 as a whole, the labor certification does not provide that the minimum academic requirements of a bachelor's degree in computer science, mathematics or engineering might be met through a foreign educational equivalent, and the ETA Form 9089 explicitly states that the petitioner will not accept any foreign educational equivalent for the proffered position. Here the beneficiary does not have a United States baccalaureate degree in

one of the required fields. The beneficiary thus does not meet the job requirements on the labor certification, and thus, does not qualify for the proffered position.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's May 6, 2010 decision. The petitioner failed to establish that the beneficiary possessed a U.S. bachelor's degree. This was explicitly required on the ETA Form 9089, and thus, the beneficiary does not qualify for the proffered position. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.